No. 18269 ✓ See also Vol. 3191

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BEATRICE RAUCH, a Widow,

Appellant,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON,

Appellee.

BRIEF OF APPELLEE

HORTON HERMAN

ELDON H. REILEY

PAINE, LOWE, COFFIN, HERMAN & O'KELLY
602 Spokane & Eastern Building
Spokane 1, Washington

Attorneys for Appellee

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STATEMENT OF PLEADINGS AND JURISDICTION

The statement of the appellant with regard to the pleadings and jurisdiction adopted by the appellee with the following clarification:

At the conclusion of the appellant's evidence the appellee moved for a dismissal under Rule 41(b) (Tr. 336, 340, 357 and 430). The Trial Court declined to rule on said motion until all of the evidence was in (Tr. 382). The parties having rested, the appellee renewed its motion to dismiss under Rule 41(b) and for a directed verdict under Rule 50(a) (Tr. 442, 530, 557). Appellant also moved for a directed verdict (Tr. 444).

Counsel for the parties, with the concurrence of the court, agreed that a verdict form need not be submitted to the jury (Tr. 454). The Trial Court granted the appellee's motion for dismissal as of the conclusion of the appellant's case and granted the appellee's motion for a directed verdict and denied the appellant's motion for directed verdict (Tr. 453 - 454). The appellant did not move under Rule 50(b) for a new trial or a judgment in accordance with her motion for directed verdict.

Pursuant to Rule 52(a) proposed Findings of Fact and Conclusions of Law were submitted to the Court with respect to its decision granting appellee's motion for a dismissal under Rule 41(b). The Findings of Fact and Conclusions of

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Conclusions of Law were submitted to the Court

Law entered by the Trial Court represent the independent judicial labors and study of the Trial Judge, although the Trial Judge had the benefit of proposed Findings of Fact and Conclusions of Law from each party.

II.

STATEMENT OF THE CASE

The appellee supplements the appellant's statement of the case as follows:

1. PROCEEDINGS

The sequence of proceedings, as outlined on page 5 of appellant's brief are more particularly and accurately set forth on page 2, supra.

2. EVIDENCE

The appellee supplements the appellant's denomination "The Evidence" (Appellant's Brief 11 - 15) as follows:

Wayne Rauch was the pilot at the time and place in question (Tr. 11).

Wayne Rauch was afraid of water (Tr. 26, 324) and could not swim (Tr. 26, 383).

The eye witness, Streiff, realized the plane would crash when the plane touched the water half way down the lake (Tr. 106, 112).

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This same witness estimated the airstrip was 3,400 feet long (Tr. 85) and that the lake was about 3,000 feet in length (Tr. 87). This witness testified that he observed the plane "rise slightly and hit the water and spray fly. I was amazed at the rapidity with which it sunk. It went down nose first . . ." (Tr. 88). The plane hit the water at 60 to 90 miles per hour (Tr. 108, 113). This occurred an estimated 1,000 feet from the east end of the lake where there were stumps, rocks and trees (Tr. 111) or about three-quarters the distance down the lake (Tr. 84). The impact point was otherwise described as "about 200 yards" from the half-way point (Tr. 112).

At no time did this eye witness see either occupant of the plane after the crash (Tr. 98, 117, 119) although he kept it "in very close vision" (Tr. 105) and had an unobstructed view (Tr. 129).

Witness Streiff heard no shouts or anything of that kind (Tr. 119). This is an isolated area with no distracting noises and sound carried over water (Tr. 143).

While Streiff was at the plane after the crash he saw no one (Tr. 121) and no personal effects came to the surface (Tr. 98).

James Renshaw, a witness at the scene within minutes after the plane sank, heard no voices shouting or anything, and saw no activity in the vicinity of the airplane (Tr. 244, 249).

Skindiver Welch, during his underwater search on the

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day following the accident, observed damage to the plane's right wing struts (Tr. 262, 278), fuselage fabric (Tr. 264), right wheel and landing assembly (Tr. 277). An interior brace located between the pilot and the windshield was bent (Tr. 283). The plexiglass windshield on the pilot's side was broken out (Tr. 262, 267) and the windshield glass was found inside the plane's cabin (Tr. 268) and ahead of the nose of the plane (Tr. 267).

Skindiver Ketcham, who made his search on the second day following the accident, observed substantially the same plane damage (Tr. 173, 174, 204, 210, 211). This witness also testified as follows (Tr. 215):

"Q. But am I not true in stating to you that you told me last Friday that you thought they were stunned and dazed by this crash?

A. I believe, sir, what I told you was that the crash was a contributing factor and that they might have been stunned and dazed.

Q. Yes, all right, well, that is what I was getting at and that is your testimony today, is it not?

A. Precisely."

Eye witness, Streiff, testified as follows (Tr. 116):

"Q. Well, now, on the night of August 24 it was your opinion that the occupants were stunned, isn't that true, from what you observed?

A. Yes, sir."

The body of Wayne Rauch came to the surface (Tr. 292) five to six feet from the fuselage of the plane (Tr. 327) on Wednesday, August 23 (Tr. 291). This event took place before the plane was moved and while they were dragging

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Streiff, on the day of the accident, and Ketcham and Welch shortly thereafter, found the plane stable with its nose on the bottom of the lake (Tr. 120). The plane in this position would support them (Tr. 216, 282) as they rested on it (Tr. 121), and one of them stood on the plane with his head above water (Tr. 281, 282).

It was generally agreed that the water was very cold (Tr. 28, 96, 97, 122, 171). The lake had a slight underwater current (Tr. 28).

The bottom of the lake in the general area of the plane was muddy (Tr. 185, 267) and had marine or kelplike growth (Tr. 266) on it, variously estimated to be from one to five feet in height (Tr. 178, 265). Visibility was limited (Tr. 28, 178, 267). No pathway or evidence of struggle was indicated in the marine growth (Tr. 184, 265, 266).

Don Ward, coroner of Latah County (Tr. 147), living at Moscow, Idaho, where he is employed at Short's Funeral Chapel (Tr. 146), testified to "a slight bruise mark on his forehead" (Tr. 162) in the middle (Tr. 165). A bruise occurring after death is not "discernible" (Tr. 423, 424).

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III.

EVIDENCE SUPPORTING THE CHALLENGED FINDINGS OF FACT SPECIFICATION OF ERROR VI

The Findings of Fact and Conclusions of Law came into being from the language of Rule 52(a):

> "Findings of Fact and Conclusions of Law are unnecessary . . . except as provided in Rule 41(b)."

and of Rule 41(b):

> "If the court renders judgment on the merits against the plaintiff, the court shall make Findings as provided in Rule 52(a)."

The necessity for them may have been a misconception of counsel. A motion for dismissal under Rule 41(b) may be viewed by this Court as a motion for directed verdict in a jury trial, as suggested on page 12 of this brief.

In spite of these considerations, Findings of Fact have a threefold purpose; to aid the Trial Judge in the process of a judicial determination; to aid the appellate court on review; and to apply the doctrines of res judicata and estoppel by judgment.

1. As to Findings of Fact X and XI.

Appellant attacks Findings of Fact Nos. X and XI, arguing only that the Court should not have considered such facts, even though the record supports the findings.

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On the direct examination of appellant's witness, Mr. Walter May, a private pilot (Tr. 290) and a friend and hunting companion (Tr. 324) of the decedent, it was first developed that the flying conditions comparable to those at Fish Lake on August 24, 1958 ". . . are real rough" (Tr. 318) and ". . . real bad for flying" (Tr. 318). Having developed the facts, appellant should not now complain.

Appellant contended, during the trial, and does now, that the decedent made a controlled landing or "ditched" the plane. Certainly the flying conditions and the capacity of the plane are material to that issue. The effect of altitude and temperature on air density, the weight of the plane and its load and the power are an integral part of any consideration of how this accident occurred. Witnesses of both parties testified to these matters without objection (Tr. 401 - 405).

2. As to Finding of Fact XIV.

The evidence supporting Finding of Fact XIV is not disputed and went in without objection (Tr. 120, 121, 216, 281, 282). The Stinson aircraft being stable in the water and capable of supporting the weight of a person, offered to the decedent and his passenger, Brunton, a place of potential safety close at hand. If either or both had gotten out of the plane after the crash with sufficient capacity for self-preservation to use the plane as a

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support, the reasonable inference is that they would have done so. The evidence demonstrates they did not.

3. As to Finding of Fact XVI.

Appellant admits that the testimony bears out this finding of fact, but contends "there is no evidence that a voice could be heard over a distance of 3,000 feet". The professional guide and outfitter, James Renshaw (Tr. 240) who had been in the immediate Fish Lake area every summer and hunting season since 1953 (Tr. 240) testified the air was still on the day of this accident (Tr. 253).

The following testimony was developed (Tr. 249 - 250):

"Q. Does that lake, do the sounds carry up there well or not?

A. Yes, generally.

Q. What would you say about whether or not you could hear people talk on the lake?

A. Generally you can.

Q. From one end to the other?

A. Yes."

This evidence is, of course, supported by common experience with sound carrying over water in isolated areas where there are no distracting noises (Tr. 102, 143). This witness heard no voices, activity, shouting or anything (Tr. 244, 249).

The single comment in the evidence that even though there had been heads above the water they might not have been seen, had to do with the fact that the rudder of the plane offered an obstruction to view from the vantage

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point of witness Streiff, in that the rudder projected above the surface of the water about 2½ feet and from Exhibits 9 and 10 was approximately 8 inches wide. Anyone hidden behind this comparatively small projection would have, of necessity, had to have been lying on or within easy arms reach of the remainder of the tail assembly and the rear of the plane's fuselage.

4. As to Finding of Fact XXII.

One of the established facts of this case, as set forth in Finding of Fact No. XXII, is that "after the plane sank into the lake, Wayne Rauch never reached a position of safety or a position of potential safety". The record is replete with references to the facts that neither the pilot nor passenger were ever seen or heard from after the plane sank, until their bodies were recovered (Tr. 98, 119, 121, 244, 249, 252). The Court fully and correctly treated the respective burdens of the parties with respect to their various contentions and made clear its use of the words "result" and "cause" in its oral opinion, the findings of fact and the conclusions. The negative finding here contained merely emphasizes that there was no evidence of any intervening independent cause of death.

5. As to Finding of Fact XXIV.

See argument infra this brief, pages 21 and 22.

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5. As to Finding of Fact XXIV.

6. As to Finding of Fact XXVI.

Appellant's comments with respect to this finding are without merit. The existence of the contract is a fact and the finding set forth in the last sentence of Finding of Fact XXVI is supported by the facts and law. See argument infra this brief, pages 22 and 23.

6. As to Finding of Fact XXVI.

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SUMMARY OF ARGUMENT

Since this was a jury trial, for purposes of review, appellee's motions for dismissal and directed verdict which were granted can be viewed as though the Court granted the single motion for directed verdict.

2B Barron and Holtzoff, Federal Practice and Procedure, Section 1074 at 371 and 372

Sano v. Pennsylvania Railroad Co., 282 F. 2d 936 (3rd Cir., 1960)

Kingston v. McGrath, 232 F. 2d 495 (9th Cir., 1956)

The main question for determination on review is "whether there was an adequate evidentiary basis" to make the issue whether the insured's death occurred outside the scope of the exclusion clause one of fact for the jury. New York Life Ins. Co. v. Dick, 252 F. 2d 43 (8th Cir., 1958). Viewing the evidence as a whole, there must be some "substantial evidence to take the case to the jury". 2B Barron and Holtzhoff, Federal Practice and Procedure, Section 1075 at 375. A "mere scintilla of evidence" or "any potpourri of evidentiary fragments laced with hints" does not entitle a plaintiff to have his case sent to the jury. Gunning v. Cooley, 281 U.S. 90, 94 (1929); Rozhon v. Triangle Publications, 230 F. 2d 359, 361 (7th Cir., 1956). Nor is a plaintiff entitled to the benefit of inferences which are unreasonable. New York

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Life Insurance Co. v. Dick, 252 F. 2d 43 (8th Cir., 1958). The Appeal Court is here asked to determine whether, on the whole record and the reasonable inferences therefrom, there is any substantial evidence that the insured's death did not occur while he was operating or serving as a member of the crew of an aircraft.

The appellee's arguments may be summarized as follows:

I. The death of the insured occurred "while operating or serving as a member of the crew of an aircraft".

A. On the record before the Court, there was no substantial evidence to support an inference that the insured surfaced after the crash and died because of his inability to reach shore by swimming.

B. Even if the insured did surface after the crash and die because of his inability to reach shore by swimming, his death nevertheless occurred while he was operating or serving as a member of the crew of an aircraft as a matter of law.

(1) The rule of strict construction against insurance companies does not apply if the clause in question is not ambiguous.

(2) The insured's death was within the contemplation of the parties to the contract, contracting with respect to excluding

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aviation risks and using the language "while operating or serving as a member of the crew of an aircraft".

(a) The insured died while operating an aircraft.

(b) The insured died while serving as a member of the crew of an aircraft.

C. If the insured did not surface after the crash and did not die because of his inability to reach shore by swimming, it follows, a fortiori, that his death was within the exclusion clause as a matter of law.

II. The District Court did not err in refusing to admit in part into evidence the death certificate (Exhibit 2).

A. The certificate was inadmissible under 28 U.S.C. 1732, for the purpose it was offered.

B. A proper foundation was not laid.

C. The Court's refusal to admit the certificate was, in no event, prejudicial to the appellant.

III. The appellant failed to make the appropriate motions under FRCP 50(b), and her remedies on appeal are therefore limited.

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ARGUMENT

I. THE DEATH OF THE INSURED OCCURRED "WHILE OPERATING, OR SERVING AS A MEMBER OF THE CREW OF AN AIRCRAFT".

A. On the Record Before the Court There Was No Substantial Evidence To Support an Inference That The Insured Surfaced After the Crash, and Died Because of His Inability To Reach Shore by Swimming.

The undisputed and controlling facts of the case as stipulated or uncontradicted in the evidence are these:

1. On August 24, 1958 at 5 o'clock P.M. (Tr. 92) the insured's heavily loaded plane (Tr. 402), unable to remain airborne (Tr. 106, 107) crashed into Fish Lake (Tr. 88, 112) at 60 to 90 miles per hour (Tr. 108, 113).
2. It sank nose first very rapidly (Tr. 88) with amazing speed (Tr. 112) and sent up a tremendous shower of spray (Tr. 131).
3. Immediately following the crash, no movement or sounds were observed or heard coming from the vicinity of the submerged plane (Tr. 98, 117, 119, 129, 249, 252), although sound carried well (Tr. 250).
4. The crash did substantial damage to the plane (Tr. 262, 264, 277, 278, 173, 174, 204, 211). An interior brace located between the pilot and the windshield was bent (Tr. 210, 283).

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4. The crash did substantial damage to t

5. A bruise was observed on the middle of Wayne Rauch's forehead (Tr. 162, 165) which occurred before death (Tr. 423, 424).

6. The left door on the pilot's side was forced open (Tr. 173, 186, 260).

7. The insured's body floated to the surface (Tr. 292) five to six feet from the fuselage of the plane (Tr. 327) on Wednesday, August 27th (Tr. 291).

8. By means of a grappling hook, the body of the passenger, Dale Brunton, was recovered 15 to 20 feet from the left wing tip of the plane (Tr. 246).

9. The plane at rest in the water was stable (Tr. 216) and would support the weight of a man (Tr. 120, 121, 282) who could stand on the trailing edge of the left wing near the cockpit with his head above water (Tr. 281).

10. The insured, Wayne Rauch, was afraid of water (Tr. 324) and could not swim (Tr. 26, 383).

11. There was no testimony as to the medical cause of death.

On these facts, whether the insured surfaced and died because of his inability to reach shore by swimming is sheer speculation. There is no evidence to support an inference that he did. While the appellant is entitled

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to all reasonable inferences, she is not entitled to the benefit of inferences which are unreasonable.

Russell v. Turner, 148 F. 2d 562, 565 (8th Cir., 1945)

New York Life Ins. Co. v. Dick, 252 F. 2d 43, 45 (8th Cir., 1958)

B. Even if the Insured Did Surface After The Crash, and Die Because of his Inability to Reach Shore by Swimming, His Death Nevertheless Occurred While He Was Operating or Serving as a Member of the Crew of an Aircraft as a Matter of Law.

(1) The rule of strict construction against insurance companies does not apply if the clause in question is not ambiguous.

While it is true that if an ambiguity exists in a clause in an insurance contract, the courts will construe such an ambiguous clause against the insurance company, this rule of strict construction has no place in interpreting a clause which is not ambiguous. Bergholm v. Peoria Life Insurance Company, 284 U.S. 489, 492 (1932).

> "(The rule of strict construction) furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings.
>
> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense."

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In Williams v. Union Central Life Insurance Company, 291 U.S. 170 (1933), Chief Justice Hughes stated at page 180:

> "While it is highly important that ambiguous clauses should not be permitted to serve as traps for policy holders, it is equally important, to the insured as well as the insurer, that the provisions of insurance policies which are clearly and definitely set forth in appropriate language, and upon which the calculations of the company are based, should be maintained unimpaired by loose and ill-considered interpretations."

The Trial Court in its Pre-trial Order, ruled that the laws of the State of Washington shall apply to the construction of the insurance contract in dispute (Tr. 14). The Supreme Court of that State has repeatedly held that the rule of strict construction has no application where the provisions of the policy are not ambiguous; and that the rule of strict construction should not be permitted to have the effect of making a plain agreement ambiguous, and then interpreting it in favor of the insured. Lawrence v. Northwest Casualty Company, 50 Wn. 2d 282, 331 P. 2d 670 (1957); Hamilton Trucking Service v. Automobile Insurance Company of Hartford, 39 Wn. 2d 688, 237 P. 2d 781 (1951); Lesamiz v. Lawyers Title Insurance Corp., 51 Wn. 2d 835, 322 P. 2d 351 (1958).

The appellee contends that this exclusion clause in using the words "while . . . operating . . . or serving as a member of the crew of an aircraft" is not ambiguous, the Trial Court held that this clause is not ambiguous (Tr. 29, 30, 446) and the appellant concedes that this

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The appellee contends that this exclusion

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as a member of the crew of an aircraft" is not

clause is not ambiguous. (Appellant's Brief, p. 16).

(2) The insured's death was within the contemplation of the parties to the contract, contracting with respect to excluding aviation risks and using the language "while operating or serving as a member of the crew of an aircraft".

Cases are legion in which the courts have held that death by drowning following an airplane crash is within an aviation exclusion clause.

Green v. Mutual Benefit Life Insurance Co., 144 F. 2d 55 (1st Cir., 1944)

Neel v. Mutual Life Insurance Company of New York, 131 F. 2d 159 (2nd Cir., 1942)

Order of United Commercial Travelers of America v. King, 161 F. 2d 108 (4th Cir., 1947)

Appellant urges, however, that because of peculiar wording in this particular clause the reasoning of these opinions is not applicable. Appellant's argument seems to be that "while operating" limits the exclusion to death actually occurring within a period of time defined by Webster to terminate somewhat short of this insured's underwater expiration. However, with noteworthy inconsistency, appellant admitted during trial that, if the insured had been injured in a land crash and died on the way to the hospital, his death would have occurred "while operating" an airplane (Tr. 377). If, as appellant suggests, there is a distinction between death from drowning following a

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water crash and death from impact injuries following a land crash, it is not a distinction in measurement of time, but a distinction in causation. Yet appellant rules out such a distinction by maintaining that this case cannot be decided on a theory of causation (Appellant's Brief, p. 25).

It should be noted that appellant's ultimate argument (Argument No. 4, Appellant's Brief, p. 10) is that the insured "lost his life from other causes" and not that he lost his life at some other time. This is a causation argument; namely that the cause of death was independent of the termination of the flight. In the two cases principally relied on by the appellant, McDaniel v. Standard Accident Insurance Co., 221 F. 2d 171 (7th Cir., 1955) and Eschweiler v. General Accident Fire and Life Assurance Corp., 241 F. 2d 101 (7th Cir., 1957), the Court concluded that death was caused by an independent, intervening cause. As elsewhere demonstrated in this brief, there is no evidence of an independent, intervening cause in this case.

Appellant mistakenly criticizes the Trial Court for applying a "proximate cause" approach to this case (Appellant's Brief, pp. 16, 17). In fact, the Trial Court rejected a proximate cause analysis and spoke instead of terms of a "predominate cause" of death (Tr. 29, 30, 452). In doing so, the Trial Court was following opinions of Judges Cardozo and Augustus Hand which

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suggest that in interpretation of contract provisions of this kind, a concept of a "predominate cause", depending both on the facts and the wording of the contract, is most helpful.

Bird v. St. Paul Fire & Marine Insurance Co., 224 N.Y. 47, 120 N.E. 86 (1918) at 87 by Judge Cardozo:

> "General definitions of proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts. There are times when the law permits us to go far back in tracing events to causes. The inquiry for us is how far the parties to this contract intended us to go. The causes within their contemplation are the only causes that concern us . . . The same cause producing the same effect may be proximate or remote as the contract of the parties seems to place it in light or shadow. That cause is to be held predominate which they would think of as predominate. A common sense appraisement of everyday forms of speech and modes of thought must tell us when to stop . . ." (Emphasis added).

Neel v. Mutual Life Insurance Co. of New York, 131 F. 2d 159 (2nd Cir., 1942)

These cases, in speaking of a "predominate cause" are looking to what cause the contracting parties would think of as predominate. The key question becomes what was within the contemplation of the parties. It seems clear that persons contracting with regard to aviation risks contemplate that a land plane may go down over water in such circumstances that death from drowning will follow, and that such death is a risk ordinarily

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incident to aerial flight and within the contemplation of the contracting parties.

Order of United Commercial Travelers of America v. King, 161 F. 2d 108 (4th Cir., 1947) at page 109:

> "We think it a rather violent fiction to say that death, under such circumstances, comes from accidental drowning. Common knowledge and experience fairly shout of the dangers of shock, exposure and drowning when a flight is taken over water in the wintertime in a land-based plane . . .
>
> "It is true that rescue, routine or fortuitous may remove a man from peril. But it does not follow that the failure of rescue brings the peril that causes the death."

Neel v. Mutual Life Insurance Co. of New York, 131 F. 2d 159 (2nd Cir., 1942) at page 160 by Judge Augustus Hand:

> "It seems quite contrary to the natural meaning of the proviso to say that (the insured) did not meet his death from 'participation in aeronautics' merely because he may not have been killed by impact upon water."

And at page 161:

> "The flight and not the drowning was the predominate cause of death."

It is true that the Neel, Green and King cases, cited supra, interpret exclusion clauses somewhat different in wording than the one at bar. However, even assuming these differences are material, these cases establish at least, that where flight is followed by drowning, the predominate cause of death is the flight and that drowning is not an independent, intervening cause. For this reason the District Court's discussion

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of predominate cause was neither irrelevant nor erroneous. It was, in fact, an essential step to its ultimate conclusion.

The remaining question is whether the exclusion clause in this particular policy is nevertheless inapplicable because of its allegedly peculiar wording.

> ". . . this certificate does not cover death . . . (e) While the assured . . . is operating . . . or serving as a member of a crew of an aircraft." (Tr. 6)

The Third Circuit has interpreted a "while riding in an automobile" clause to apply to injuries sustained by the insured when he jumped out of a car which was out of control on a steep grade. Wright v. Aetna Life Insurance Co., 10 F. 2d 281 (3rd Cir., 1926). At page 283, the court stated:

> "If one were insured while 'riding in a motorboat,' and circumstances arose where the steering gear ceased to control and the vessel was headed for a dam, rapid, or other vessel, and a frightened passenger jumped out to save himself, and thereafter succumbed and was drowned, while not riding in the motorboat, a reasonable man might contend that under such circumstances the passenger was covered by such policy, although actual death came from drowning. In the present case the real accident was not when Wright's head struck the road, but when car control was lost. Such lost car control was the critical accident time, and the dominating factor which subjected the riding passenger to present peril and later death." (Emphasis supplied.)

Similarly, in the case at bar, it was lost airplane control which was the critical accident time and the dominating factor which subjected the insured to present

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peril and later death. If, as the Third Circuit suggested, it is "the critical accident time" which must occur within whatever time period is encompassed by the word "while", there can be no question but that such critical accident time was while the insured here was still operating his plane under even the narrowest and most restricted and literal definition of "operating". The loss of plane control and therefore the critical accident time occurred while the plane was still in motion and the insured was still at the stick.

Cases have generally, however, given a much broader definition to the word "operating" as used in "while operating" clauses in insurance contracts. "Operating" is not limited to the manipulation of a vehicle's controls. It has been held to include repairing a punctured tire, Union Indemnity Company v. Storm, 86 Ind. App. 562, 158 N.E. 904 (1927), and getting into and alighting from a vehicle. Southern Surety Co. v. Davidson, 280 S. W. 336 (Tex. Civ. App., 1926) held that an injury to a driver who stepped on a loose brick and fell getting out of his car, occurred "while operating" the automobile. The Court said, at page 337:

> "The operation of an automobile necessarily implies doing all that is necessary to be done to successfully move the same from place to place. It must necessarily be entered and upon reaching his destination, the operator must alight to the ground within a reasonable time after his arrival."

See also Fromby v. World Insurance Company of Omaha,

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Nebraska, 115 F. Supp. 913 (W.D. Ark., 1950) at page 925:

> ". . . in the final analysis it is the duty of the court to give a common sense interpretation to the language to the particular insurance policy . . . The act of entering a conveyance preparatory to being transported to work is an essential step of the transportation, and the only reasonable conclusion is that such was within the intention of parties in using the language 'riding in'."

Life and Casualty Insurance Co. v. Tollison, 223 Ala. 78, 134 So. 805 (1931)

Pittman v. Lamar Life Insurance Co., 17 F. 2d 370 (5th Cir., 1927)

Murphy v. Union Indemnity Co., 176 La. 383, 134 So. 256 (1931)

Other decisions interpreting "while operating" or "while riding in" clauses are collected and discussed in Walden v. Automobile Owner's Safety Insurance Co., 228 Ark. 983, 311 S.W. 2d 780 (1958). In that case the insured accidently drove his car into an abandoned pit filled with water. The water came up to the seat of his car and he jumped out the window. His body was later found about 75 to 100 feet from the car, at a place where the water was about 10 to 12 feet deep. The Court held that his death was within a policy insuring against injuries sustained "while riding or driving an automobile" and stated, at page 782:

> "The fact that he may have struggled 75 or 100 feet before he drowned is not material."

To the same effect is Inter-Ocean Insurance Company v. Ellis, 302 S.W. 2d 124 (Ky., 1957).

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The Walden case accepts as controlling authority Wright v. Aetna Life Insurance Co., 10 F. 2d 281 (3rd Cir., 1926), discussed above. It notices McDaniel v. Standard Accident Insurance Co., 221 F. 2d 171 (7th Cir., 1955), and Eschweiler v. General Accident Fire and Life Insurance Corp., 241 F. 2d 101 (7th Cir., 1957), the opinions relied upon by appellant, but refuses to follow them (p. 783).

The Trial Court here also referred to both McDaniel and Eschweiler. It noted that both decisions were written by Judge Schnackenberg, that they had been frequently criticized (Tr. 448 - 450) and refused to follow them. Appellee submits that McDaniel and Eschweiler are distinguishable on their facts, questionable in their conclusions and have been ignored by subsequent decisions.

In McDaniel v. Standard Accident Insurance Co., 221 F. 2d 171 (7th Cir., 1955) the airplane made a smooth landing on a lake and floated for a minute and a half allowing the insured to get out uninjured and hand onto the wing a few moments before he started swimming toward shore. The insured was an accomplished swimmer and was swimming normally when he suddenly disappeared. Rightly or wrongly, the Court, through Judge Schnackenberg, treats this as a death occasioned by an intervening cause, independent of the flight. This conclusion is made apparent by the Court's analogy on page 172 to a person being gored by a bull, after a forced

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landing in a pasture, or struck by a car after a forced landing on a public highway.

In Eschweiler v. General Accident Fire and Life Assurance Corp., 241 F. 2d 101 (7th Cir., 1957) the airplane landed on ice. The insured got out of the plane uninjured and struggled through a blizzard and was found alive on a highway, but died thereafter from cardiac failure. The Court, through Judge Schnackenberg, emphasizes that it was the deceased's physical efforts after he got out of the plane that cause cardiac failure and death. The only authority cited by Eschweiler is McDaniel, and McDaniel cites no authority whatsoever.

Cases such as McDaniel and Eschweiler, based on the intervention of an independent cause of death, are readily distinguishable from Neel, Green and King, supra, and from the case at bar. McDaniel and Eschweiler may be compared with Bull v. Sun Life Assurance Company of Canada, 141 F. 2d 456 (7th Cir., 1944), and Chambers v. Kansas City Life Insurance Co., 319 P. 2d 387 (4th Dist. Calif., 1957), cases where the insured made a safe landing but lost his life on account of events unrelated to the landing or to leaving the plane.

It cannot be sensibly argued that this was a safe landing. The land-based aircraft hit the water at 60 to 90 miles per hour, with sufficient force to cause substantial damage. It immediately sank, carrying the insured to the bottom - a most hazardous and frightening

landing in a pasture, or struck by a car after
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environment for a man who was afraid of water and could not swim. If we assume that the insured surfaced, although the evidence is to the contrary, and then drowned because of his inability to swim, he never reached a position of safety or even a position of potential safety. His death by drowning under such circumstances would be a part of the flight and not the result of an independent, intervening cause.

As noted in Chambers v. Kansas City Life Insurance Co., supra, at page 389:

> "Where a plane goes down at sea a safe descent is often impossible and drowning which follows is in a practical sense a part of the descent."

Appellant's argument wholly ignores the fact that the exclusion clause in this insurance policy is not limited to "while operating" an airplane, but also extends to "while serving as a member of a crew of an aircraft".

There can be no question but that the pilot of an airplane is a member of the crew. For the proposition that one man can constitute a "crew" see:

Minor v. Western Casualty and Surety Co., 241 Iowa 530, 41 N.W. 2d 527 (1950)

Norton v. Warner Company, 321 U.S. 565 (1943)

The available authority on the interpretation of the phrase "member of a crew" indicates that the scope of activity of a member of the crew may be even broader than the scope of activity envisioned by the word "operating".

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Preferred Accident Insurance Company v. Rhodenbaugh, 160 F. 2d 832 (6th Cir., 1947)

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The appellant urges upon this Court an interpretation of this exclusion clause which, if consistently applied, would produce the absurd result that virtually nothing would be excluded by the exclusion clause. In limiting the meaning of the phrase "death while operating or serving as a member of the crew of an aircraft" to death actually occurring within the period of time when the insured is at the controls and directing the mechanical movement of the airplane, the appellant would exclude from the exclusion clause death following the impact of an airplane in a grove of trees (a) if the death followed cessation of flight by minutes of even seconds, or (b) if the insured was still alive when he was removed from the plane but died on the way to the hospital, or (c) if the insured was thrown free from the crash but was enveloped in flames and smothered to death. Yet we think, as appellant concedes, (Tr. 377) that if any one of these events had occurred "we would not be in court".

What is the distinction between a death from drowning following a plane's plunge to the bottom of a lake and a death from smothering following a plane's crash into a grove of trees? Is the death in the first case any less a death while operating or serving as a member of a crew, than the death in the second case?

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Appellee thinks not.

Having admitted that a death on the way to a hospital following a crash on land is a death "while operating", appellant cannot with logic or consistency maintain that a death within minutes following a crash to the bottom of a lake is not a death "while operating".

C. If the Insured Did Not Surface After The Crash and Did Not Die Because of His Inability To Reach Shore by Swimming, It Follows, a fortiori, That his Death Was Within the Exclusion Clause as a Matter of Law.

The foregoing argument was based on the assumption, which appellee contests, that a jury would have been warranted in finding that the insured surfaced after the crash and died because of his inability to reach shore by swimming. Of course, if the insured never gained the surface of the water, the conclusion that he died "while operating or serving as a member of a crew of an aircraft" would apply with even greater force.

II. THE DISTRICT COURT DID NOT ERR IN REFUSING TO ADMIT IN PART INTO EVIDENCE THE DEATH CERTIFICATE (Exhibit 2)

A. The Certificate was Inadmissible Under 28 U.S.C. 1732 For the Purpose it was Offered.

Appellant offered the death certificate of the insured

Appellee thinks not.

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II. THE DISTRICT COURT DID NOT ERR IN RE
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A. The Certificate was Inadmissible
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under 28 U.S.C. 1732, the Federal Business Records Act or "shop book rule". The District Court offered to admit the certificate, deleting only the coroner's statement as to the cause of death (Tr. 316).

In applying the Business Records Act to medical records containing opinion statements, Courts have made a distinction between observations of objective conditions which have been held admissible and opinion based on subjective information or based on speculation and conjecture. In Washington this distinction is illustrated by Young v. Liddington, 50 Wn. 2d 78, 309 P. 2d 761 (1957) at 85:

> "We hold that a medical opinion as to causation, which is not the result of an observed act, condition or event, cannot be established by a business record."

Under the federal statute, this distinction may be seen in Masterson v. Pennsylvania Railway Co., 182 F. 2d 793 (3rd Cir., 1950) and New York Life Insurance Company v. Taylor, 147 F. 2d 297 (D.C. Cir., 1945). These cases held inadmissible, under 28 U.S.C. 1732 and its predecessor, doctor's opinions as to a patient's condition contained in letters and hospital records.

The statement as to cause of death on a death certificate is a statement of opinion rather than fact. Kentucky Home Mutual Life Insurance Co. v. Watts, 298 Ky. 471, 183 S.W. 2d 499 (1944); New York Life Insurance Company v. Anderson, 66 F. 2d 705 (8th Cir., 1933).

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It is not a statement of an "act, transaction, occurrence or event" within the meaning of 28 U.S.C. 1732.

Appellant cites only one case in support of admitting a death certificate for the purpose of proving the cause of death under 28 U.S.C. 1732, Hunter v. Derby Foods, 110 F. 2d 970 (2nd Cir., 1940). The Ninth Circuit noted the Hunter opinion in Olender v. U.S., 210 F. 2d 795 (9th Cir., 1954) page 801, footnote 1, and also noticed that the Second Circuit has not followed Hunter in later opinions, but this Court did not follow it in Olender, supra.

The appellant produced Donald Ward who was, at the time of the death of Wayne Rauch, coroner of Latah County, Idaho, and an employee of Short's Funeral Chapel (Tr. 146). He examined the body of the decedent Rauch in connection with his duties as a funeral home employee (Tr. 146) and not as coroner of Latah County (Tr. 160). The death of Wayne Rauch occurred in Ada County, Idaho, whose coroner was Dr. Buttermore (Tr. 148). Dr. Buttermore did not examine the body and the only information that Dr. Buttermore received about the decedent was over the telephone (Tr. 148, 149). The witness Ward was not familiar with the signature of Dr. Buttermore, or his voice (Tr. 149). The opinion of the cause of death on the death certificate is thus not the opinion of Dr. Buttermore, the declarant. The opinion written on the death certificate can only be that of the witness Ward. He was precluded from stating such opinion on the

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witness stand (Tr. 163) when the Trial Court sustained an objection in part based on his lack of qualifications (Tr. 164). No appeal has been taken from this ruling.

B. A Proper Foundation Was Not Laid.

In order for the record of an "act, transaction, occurrence or event" to be admissible under the Business Records Act, it must be first shown that the record was made in the regular course of business.

Masterson v. Pennsylvania Railway Co., 182 F. 2d 793 (3rd Cir., 1950) at 797.

> "Obviously a writing is not admissible under the Business Records Act merely because it may appear upon its face to be a writing made by a physician in the regular course of his practice. It must first be shown that the writing was actually made by or under the direction of the physician at or near the time of his examination of the individual in question and also that it was his custom in the regular course of his professional practice to make such a record. This is the requirement of the Federal Business Record Act . . . it is likewise a requirement of the Uniform Business Records as Evidence Act."

McCormick on Evidence, 1954 Edition, Section 290, page 610.

> "Production of a witness, having knowledge of the facts to testify to the making of the record in the regular course of the hospital routine, and that it was the practice to make the records accurately and promptly is properly insisted on, as in the case of commercial records."

The appellant failed to show that the death certificate in this case was prepared in the usual course of business.

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On the contrary, it appears from the testimony of witness Ward (Tr. 148, 149) that the information placed on the death certificate was obtained in a very unusual manner.

C. The Court's Refusal to Admit the Certificate Was, In No Event, Prejudicial to the Appellant.

III. THE APPELLANT FAILED TO MAKE THE APPROPRIATE MOTIONS UNDER FRCP 50(b) AND HER REMEDIES ON APPEAL ARE THEREFORE LIMITED.

Not having moved for a new trial or in the alternative for judgment in accordance with her motion for directed verdict under FRCP 50(b), appellant is now precluded from seeking judgment in her favor on appeal. This rule applies even though no jury verdict was returned.

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947)

Globe Liquor Co. v. San Roman, 332 U.S. 571 (1947) reh. den. 333 U.S. 830 (1948)

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CONCLUSION

We respectfully submit that the Judgment of Dismissal and the Order on Motions For Directed Verdict should be affirmed.

Respectfully submitted,

HORTON HERMAN

ELDON H. REILEY

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Attorneys for Appellee

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Horton Herman

CONCLUSION

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